

P R O C E E D I N G S

THE COURT: Good morning. Be seated, please.

Mr. Martinez, you may call the case.

MR. MARTINEZ: Good morning, Your Honor. This is criminal case number JKB-16-363, United States versus Marquise McCants. Peter Martinez for the Government. With me this morning is AUSA Christina Hoffman. We're here the because the Court has convened a hearing to address a potential conflict of interest.

THE COURT: Thank you.

Good morning, Mr. Himeles, you've been appointed as conflict counsel for Mr. McCants?

MR. HIMELES: Good morning, Your Honor.

THE COURT: Thank you. And Mr. Francomano is present as well.

MR. FRANCOMANO: Good morning, Your Honor. John Francomano.

THE COURT: And Mr. McCants is personally present. Good morning to you, Mr. McCants.

And, Mr. Wrobel, good morning to you.

MR. WROBEL: Good morning, Your Honor.

THE COURT: You've been appointed as counsel for the witness Michael Valcourt. And Mr. Valcourt is present.

Good morning to you, Mr. Valcourt.

MR. VALCOURT: Good morning, Your Honor.

1 THE COURT: Thank you. So, Mr. Martinez, let's
2 begin with your proffer of the testimony that you believe Mr.
3 Valcourt might provide during the government's case in
4 chief.

5 MR. MARTINEZ: Your Honor, if Mr. Valcourt were to
6 testify as part of our case in chief, he would testify about
7 being the victim of a robbery and assault by Gerald Johnson at
8 the intersection of Eutaw and Lombard Street, outside a
9 nightclub, where Mr. Valcourt had been with a friend that
10 evening, had left the club, they observed two female patrons
11 outside on the corner having a fight. Mr. Valcourt went to
12 intervene and the next thing he knew he was being bludgeoned
13 either with fists or by bricks by Mr. Johnson, the defendant
14 in this case. Next thing Mr. Valcourt knew he woke up in
15 Mercy Hospital. His cell phone and his key chain, his
16 lanyard, were taken from him and later returned. So his
17 testimony would focus mostly -- entirely on the conduct of Mr.
18 Johnson in this case.

19 THE COURT: And when did this allegedly occur?

20 MR. MARTINEZ: January 6th of 2012.

21 THE COURT: Okay. And what, if anything, would Mr.
22 Valcourt have to say about Mr. McCants?

23 MR. MARTINEZ: Nothing the government is aware of,
24 Your Honor.

25 THE COURT: Okay. Thank you, Mr. Martinez.

1 Mr. Francomano.

2 MR. FRANCOMANO: Yes, Your Honor.

3 THE COURT: You've had an opportunity to observe Mr.
4 Valcourt here in court this morning.

5 MR. FRANCOMANO: I have, Your Honor.

6 THE COURT: Does it confirm your suspicion reported
7 to the Court about a week ago that you might have previously
8 represented him in a landlord/tenant matter.

9 MR. FRANCOMANO: It does, Your Honor.

10 THE COURT: Is he one in the same person.

11 MR. FRANCOMANO: He is, Your Honor.

12 THE COURT: Thanks. You may be seated. Mr. Wrobel,
13 have you talked with Mr. Valcourt about the fact that during
14 his testimony here in court, it's at least theoretically
15 possible, I guess, that Mr. Francomano might be
16 cross-examining him?

17 MR. WROBEL: Oh, yes, Your Honor. We had an
18 opportunity to have that discussion as to why he's here and
19 why I'm here, Your Honor.

20 THE COURT: Okay. So does Mr. Valcourt, with your
21 counsel, believe that there -- that Mr. Francomano is in a
22 conflict situation here. If he is in a conflict situation, is
23 it one that, as far as Mr. Valcourt's interests and rights are
24 concerned, is waivable. How do you see it, Mr. Wrobel?

25 MR. WROBEL: Well the way I see it, Your Honor, is

1 obviously Mr. Francomano's representation is certainly not the
2 same or substantially similar representation as to what's
3 occurring here. However, I think under Section (c) of the
4 rule, I do not know, because I have not certainly seen Mr.
5 Francomano's files, as to whether there's anything within Mr.
6 Francomano's files or recollection that Mr. Francomano, under
7 his ethical obligations, could still be permitted to use in
8 terms of any kind of cross-examination with respect to the
9 credibility of Mr. Valcourt once Mr. Valcourt takes the stand.
10 So my position would be that Mr. Valcourt is not waiving any
11 attorney-client representations or waiving any conflict with
12 respect to Mr. Francomano's representation five years ago in
13 that matter.

14 THE COURT: Well then --

15 MR. WROBEL: If that makes sense.

16 THE COURT: Then we'll steer away from waiver and
17 ask you the \$64,000 question which is: Do you think there's a
18 conflict?

19 MR. WROBEL: I do not believe there's a conflict,
20 Your Honor. Certainly, the -- just to be clear with the Court
21 and to be perfectly candid with the Court, I have not seen the
22 government's case. I don't think I've even seen the
23 indictment. My understanding is this has to do with a
24 defendant different than Mr. -- the defendant Mr. Francomano
25 is representing, separate in time, certainly. It would seem

1 to me Mr. Johnson's attorney would be the person primarily
2 cross-examining Mr. Valcourt if that were to be the case.

3 The only thing I can posit to the Court is I don't
4 know in the universe of whatever was shared between Mr.
5 Valcourt and Mr. Francomano years ago, in that civil
6 landlord/tenant matter, that there would be anything that
7 could be raised to question Mr. Valcourt's credibility. As I
8 stand here today, having had a conversation with Mr.
9 Francomano as well, I don't believe that there is. And to be
10 candid with the Court, I don't believe that there is any
11 information that Mr. Francomano could ethically use under the
12 rules that would be admissible in court for purposes of
13 cross-examining Mr. Valcourt. So I don't believe that under
14 the rules there's anything that satisfies certainly 19-301.9,
15 either (a), (b), or (c) in terms of representation of former
16 clients.

17 THE COURT: Thank you, Mr. Wrobel.

18 All right. So Mr. Himeles, counsel for Mr. McCants
19 is confronted with the testimony that Mr. Martinez has
20 proffered. I can imagine, from many prior similar situations
21 that you and I have both been in in courtrooms in this
22 courthouse over the last 25 years, where defense counsel on
23 behalf of someone in Mr. McCants position would stand up and
24 might ask a question, but the line of questioning that I would
25 anticipate would be, "Mr. Valcourt, have you ever seen Mr.

1 McCants before? You have no -- you know nothing about him,
2 right? You've never seen him, you've never heard of him, have
3 you ever had a conversation with him? You know, you don't
4 know anything about him; right? You don't know anything about
5 my client, is that the case, Mr. Valcourt?" Assuming you get
6 an answer, yeah, that's true, never heard of -- never seen him
7 before. No further questions. Thank you.

8 I mean, that is the strategy that I have seen
9 employed by counsel in the position of Mr. McCants' lawyer in
10 this kind of situation in the past, if the proffer provided by
11 the government is truly accurate in terms of what Mr. Valcourt
12 is likely to say. So that's kind of the starting point for me
13 in trying to evaluate the potential conflict. But you're the
14 one who represents Mr. McCants in this situation, I would like
15 to hear your views on the subject.

16 MR. HIMELES: Yes. Your Honor, that certainly is a
17 possibility. What's a concern here is that, of course, this
18 is a criminal trial. And in any trial, not just criminal
19 trials, as Your Honor knows better than I do, things happen
20 that aren't anticipated. What we know about the relationship
21 between Mr. Francomano, the attorney-client relationship
22 between Mr. Francomano and Mr. Valcourt, is first there was
23 this landlord/tenant matter. Mr. Francomano believes that he
24 got a couple of other calls. He doesn't at this moment recall
25 what they were about. They were after the landlord/tenant

1 matter, but a number of years ago and they did not ultimately
2 lead to representations.

3 But of course confidential information shared in
4 contemplation of representation is confidential. And he would
5 be precluded from using that information. And while he
6 doesn't remember it now, and I certainly take Mr. Francomano
7 at his word, during the course of a trial, as testimony comes
8 in, something may strike a cord and refresh his recollection.
9 And Mr. Valcourt's testimony, while I don't -- I'm not
10 questioning for a second the good faith of the government, it
11 may evolve in some unanticipated way. For example, when he's
12 being cross-examined by counsel for the co-defendant.

13 So the concern here is that there clearly -- I would
14 submit there clearly is a potential conflict. And if that
15 potential conflict materializes during the course of trial and
16 Mr. Francomano recalls something that is relevant, it turns
17 out that it's helpful to Mr. McCants or important to Mr.
18 McCants, Mr. Francomano to examine him -- examine Mr. Valcourt
19 concerning -- to a greater extent than the Court's hypothesis.
20 And if he recalls something that is relevant to that
21 cross-examination, he will be precluded from using it.

22 THE COURT: But that hasn't happened yet.

23 MR. HIMELES: It hasn't happened yet. Your concern
24 is that it could evolve, because trials are living, breathing
25 events. And no one can predict exactly what's going to happen

1 during the course of trial or how a memory might get
2 sparked.

3 MR. HIMELES: That's right. And if it happens
4 during the course of a trial, there will be no way to address
5 it at that point.

6 THE COURT: Well, let me ask you this question, and
7 that is: Are you confident as Mr. McCants' lawyer that were
8 that circumstance to develop during the trial, that Mr.
9 Francomano would, in confidence, reveal that circumstance to
10 you and your client, such that you could reassert -- or assert
11 actually, because it's not a reassertion, you could assert
12 then there's a conflict here. That's assuming you're prepared
13 to stand by over the course of this trial and be on call if
14 such a circumstance were to develop.

15 MR. HIMELES: I have no reason to think that Mr.
16 Francomano would not raise the issue, he obviously has raised
17 the issue -- the issue that arose when he received the *Jencks*
18 material. So I think that he -- I think that's right. My
19 client -- our client, but in this context my client, is
20 understandably concerned about having a lawyer who may be in a
21 position of being unable to represent him as to all -- as to
22 all witnesses going into a trial with that concern.

23 THE COURT: Absolutely. And your client is entitled
24 to conflict free counsel in -- as he faces these charges. And
25 the Court will protect that right of his. But the Court has a

1 threshold obligation, which is to make sure that before taking
2 any extraordinary action, like disqualifying a lawyer, that
3 there is actually a ripe and real conflict. And so I don't
4 think, based on what I've heard today, that such a conflict
5 exists now.

6 But I think you've done a good job of articulating
7 how, during the course of a trial, they being unpredictable
8 events, you know, something could change. And in those
9 circumstances, theoretically, I could imagine a conflict
10 potentially could arise. I think it's extremely unlikely
11 given the factual predicate we have here. But I don't
12 completely rule out the possibility of it.

13 So that's what causes me to proceed to the second
14 level of inquiry with you, which is that are you comfortable,
15 on behalf of Mr. McCants, with the notion that were a conflict
16 to emerge, that you as conflict counsel would be aware of it?

17 MR. HIMELES: May I have a moment to confer with Mr.
18 McCants?

19 THE COURT: Yes.

20 (Counsel conferring with client.)

21 THE COURT: Mr. Himeles.

22 MR. HIMELES: Your Honor, as I indicated previously,
23 I have no reason to think that Mr. Francomano would not be
24 candid or, you know, is in any way -- would be anything less
25 than candid with the Court or with me. I do --

1 THE COURT: I want to be clear, I'm not expecting
2 Mr. Francomano to reveal to you or to Mr. McCants, what
3 information it might be that suddenly gave rise in his mind to
4 there being a conflict, some memory out of something Mr.
5 Valcourt told him. That's not the question. The question is
6 whether he would just say, I've got a conflict.

7 MR. HIMELES: I certainly think that he would do his
8 best. I guess the difficulty I'm having is that in the heat
9 of trial it's very difficult to -- as I indicated previously,
10 it's difficult to anticipate what will arise. And when it
11 arises a trial lawyer, of course, is first and foremost
12 thinking about how can I respond to it and reacting on his
13 feet. And so I can't say that it's not possible that Mr.
14 Francomano, notwithstanding best efforts, would not realize
15 that there was a conflict. We certainly all know that there
16 are many cases in which lawyers proceed notwithstanding
17 conflict because they don't think there's one, in addition to
18 the cases where they proceed knowing there's one.

19 So I don't have a specific scenario in mind, and I
20 expect Mr. Francomano to bring to my attention anything that
21 he -- I would expect him to bring anything to my attention
22 that he recognizes as a conflict. But, you know, there is a
23 risk and there is -- you know, there's no way for anyone else
24 to judge that at the time. And so if there is an oversight
25 that impairs his ability to examine Mr. Valcourt, then -- or

1 to make a determination whether to examine him and on what
2 subjects, then that oversight will have prejudiced Mr.
3 McCants.

4 THE COURT: Okay. So I understand that on a
5 theoretical basis. But you know what really will raise this
6 question very squarely at the moment Mr. Himeles, not to put
7 you on the spot, but we -- there is actually no motion before
8 the Court to disqualify Mr. Francomano. We're in a situation
9 where we're reviewing the question of whether or not he is
10 able to proceed, and whether or not he's conflict free, or if
11 there's a conflict whether there is waiver of it. I took us
12 into this by simply asking the question last week of, well, if
13 there is a conflict is it a waivable conflict and has it been
14 waived? And then we decided, well, we can't really ask that
15 question without conflict counsel having been appointed and so
16 forth.

17 Well, now all of that has been accomplished. And
18 honestly, this morning, in speaking with you and Mr. Wrobel,
19 I'm not persuaded that as of this moment that there's any
20 conflict. I am persuaded that there's a remote possibility
21 that one could arise.

22 I can't quite imagine exactly how, given the proffer
23 from Mr. Martinez, which is that this witness was involved in
24 a specific incident, not an ongoing relationship, but a
25 specific particular incident with Defendant Johnson, that

1 that -- it's in relation to that incident that the government
2 is calling him to testify as a witness. And that there
3 doesn't seem to be anything to indicate that this testimony
4 will bear in any way, shape, or form on the culpability of Mr.
5 McCants, because while it's certainly the government's theory
6 that Mr. Johnson had a very substantial relationship with Mr.
7 McCants, this particular incident, based on the proffer I've
8 heard, doesn't figure into that part of the government's case
9 at all. The testimony seems to be focused solely and
10 exclusively on conduct that Mr. Johnson allegedly engaged in.

11 So I do not perceive a conflict now. I do not have
12 before me a motion seeking to disqualify Mr. Francomano from
13 the representation of Mr. McCants. And without such a motion,
14 which Mr. Himeles, of course, I'll give you every opportunity
15 to make, but of course you can only make that motion if you've
16 got, you know, your good faith basis for making it. I haven't
17 heard one yet. I said I haven't heard the motion yet, I
18 haven't given you a chance to try to show a good faith basis
19 if you do make such a motion. But my understanding of where
20 we are is that we've uncovered a -- the potential, I think the
21 remote potential for a conflict to become apparent.

22 As the matter stands at the moment, I am unable to
23 articulate, nor has any lawyer articulated to me, the scenario
24 under which the conflict actually develops, not a theoretical
25 one, but actually. You know, this is what Mr. Francomano, or

1 someone in his shoes, should reasonably be asking Mr. Valcourt
2 about in cross-examination. This is a line of impeachment
3 that he should be pursuing. This is why it is important to
4 Mr. McCants that the credibility of Mr. Valcourt be attacked
5 and undermined if possible. This is the strategic value of
6 such a -- well, of such a strategy on the part of the defense
7 of Mr. McCants. None of that has been laid out here.

8 So --

9 MR. HIMELES: Your Honor, if I may?

10 THE COURT: Yes, Mr. Himeles.

11 MR. HIMELES: One point, and that is that I do think
12 that the testimony of Mr. Valcourt does relate to Mr. McCants
13 in the legal sense. This is testimony concerning a fight,
14 which I presume the government contends was in furtherance of
15 the alleged conspiracy. And under *Pinkerton* it would be
16 imputed to Mr. McCants as well. It's not clear to me and, of
17 course, I don't know the case in the way that Mr. Francomano
18 does and in the way that the government does, but it's not
19 clear to me how it's in furtherance of the conspiracy. But I
20 presume that that is their contention. If it weren't I don't
21 know what basis it would be offered. So in that sense the
22 evidence is evidence that's being offered against Mr. McCants
23 as well.

24 THE COURT: Suppose the government was prepared to
25 enter into a stipulation that any testimony from Mr. Valcourt

1 is not admissible against Mr. McCants, would that cure any
2 theoretical abstract possibility of there being a conflict
3 here, subject to the normal concerns that lawyers always have
4 about, well, that's just a limiting instruction and the jury's
5 still hearing it, et cetera, I understand, but apart from that
6 concern, would that serve as a technical solution to our
7 theoretical problem?

8 MR. HIMELES: Well, the concern that Your Honor's
9 articulated of course is the concern I was about to
10 articulate, because lawyers articulate those concerns and I'm
11 a lawyer, so that's -- but that is a real concern. It's
12 always a concern. And a limiting instruction goes only so
13 far, but I know Your Honor understands that.

14 Beyond that, I'm not sure that honestly I would need
15 to confer with Mr. Francomano and with my client, as to
16 whether such a stipulation would be beneficial. It would
17 prevent or -- it wouldn't prevent, I suppose as long as Mr.
18 Francomano could still stand up, assuming the only thing he
19 has to cross-examine Mr. Valcourt about is along the lines of
20 what you suggested earlier, you've never met Mr. McCants,
21 you've never seen him, you don't know who he is, as long as
22 that cross-examination would still be permitted, then I think
23 such a stipulation would be -- would be helpful.

24 THE COURT: Well, let me first ask the government
25 whether they would be willing to enter into such a

1 stipulation.

2 MR. MARTINEZ: We'd have to consider that, Your
3 Honor, there is an allegation in our speaking indictment in
4 the RICO conspiracy count, that members of the Greenmount
5 regime committed robberies, both inside and outside their
6 territory, and there will be testimony by multiple witnesses
7 about instances in which somebody said, hey, I got a lick for
8 us over on the west side, or somebody went and did a robbery
9 in Cecil County, or there was an assault and robbery in this
10 case at Eutaw and Lombard. So the mere fact that it happened
11 outside the territory occupied by this gang doesn't make it
12 not in furtherance. And so to answer the question --

13 THE COURT: Well, I assume you have a theory for why
14 it's in furtherance, I don't think that's really what's in
15 debate here. The question is whether you're prepared to carve
16 out one incident and say the proof on this incident is not
17 being offered against Mr. McCants.

18 MR. MARTINEZ: And the reason I was, I think,
19 explaining our theory why it's in furtherance of the
20 conspiracy was to say, you know, at the end of the day, Your
21 Honor, this is an overt act that we've alleged in furtherance
22 of the conspiracy and as brought by the grand jury, I think
23 would apply to all defendants.

24 To the extent the Court has a real concern about a
25 conflict here, and I understand the potential conflict being

1 raised here to be very -- it's based on the very speculative
2 assumption that there's going to be some kind of eureka moment
3 while Mr. Valcourt is on the stand, in terms of Mr. Francomano
4 suddenly remembering something he doesn't remember now, having
5 gone through his file and prepared for today's hearing, and
6 all the sudden Mr. Valcourt's going to get on the stand and
7 he's going to have a eureka moment, and remember some piece of
8 impeachment material. That's speculative assumption number
9 one. Speculative assumption two is that something in the heat
10 of trial prevents him from adequately raising his hand and
11 saying, hey, I have a conflict.

12 In light of all of that, given the speculative
13 nature of a potential conflict, given the fact that the grand
14 jury returned this indictment with an overt act alleged
15 against all nine defendants in the case, I'm not persuaded
16 that we need or ought to have to enter into such a
17 stipulation.

18 THE COURT: It's totally your call. You know, I'm
19 not in the business of forcing lawyers to enter into
20 stipulations. I just throw it out as one possible approach to
21 dealing with the issue or the problem. It's your record. And
22 you, you know, will make your own judgment about what you need
23 to do to protect it. And it was simply a question. I
24 understand the government's position.

25 MR. MARTINEZ: Thank you, Your Honor.

1 THE COURT: Yes. Mr. Himeles.

2 MR. HIMELES: Well, Your Honor, I suppose the only
3 point that I would make is that Mr. Martinez's response of the
4 government's position illustrates two things, first how this
5 testimony does relate to Mr. McCants. And secondly --

6 THE COURT: Indeed.

7 MR. HIMELES: I think that if the issue does arise
8 at trial, however speculative or uncertain that may be, if it
9 does arise at trial, I don't think at that point it would be
10 curable. I think that the opportunity to address that issue
11 will -- is -- presents itself now. And once we're at trial, I
12 think that if the jury hears testimony from -- and then is
13 told to disregard a witness's testimony there would be, you
14 know, after a, you know, after everybody rushes up to the
15 bench and there's lots of concern, I'm not sure how that bell
16 can be unrung.

17 It's not just, you know, one statement as, you know,
18 as typically happens. A witness is testifying, he makes a
19 statement, there's an objection, counsel -- the Court
20 instructs the jury to disregard it. It's a witness, it's an
21 entire witness whose testimony the jury is told to disregard
22 after they've already heard it. So I think it would be very
23 difficult to address it at that point.

24 THE COURT: Thank you, Mr. Himeles. Well, my ruling
25 today is that I have not been persuaded that there is actually

1 a conflict of interest that Mr. Francomano is confronted with
2 as things stand currently. I find that he -- that despite our
3 best efforts to explore this, that there's no -- here are the
4 differences: Mr. Francomano represented Mr. Valcourt many
5 years ago, it was in 2010 as I recall, Mr. Francomano?

6 MR. FRANCOMANO: Correct, Your Honor.

7 THE COURT: In 2010. It was in a landlord/tenant
8 matter, not a criminal case. The high water mark of this is
9 that there may have been some conversations between Mr.
10 Valcourt and Mr. Francomano in months or years subsequent to
11 2010, during which there was at least consideration on the
12 part of the two of them that they would reform their
13 attorney-client relationship, and that Mr. Francomano would
14 represent Mr. Valcourt in other matters. But none of that
15 ever came to fruition, and the actual representation is
16 limited to the single landlord/tenant matter some seven years
17 ago.

18 So Mr. Francomano has been representing Mr. McCants
19 pursuant to court appointment in this case since earlier this
20 year, Mr. Francomano?

21 MR. FRANCOMANO: February of 2017.

22 THE COURT: So February 2017, some seven years or
23 nearly seven years subsequent to the representation of Mr.
24 Valcourt in the landlord/tenant matter. So there's been a
25 substantial passage of time. Mr. Francomano is an esteemed

1 officer of this court and I have every confidence that, like
2 the other good lawyers that practice here, he will for this
3 court identify and own his conflicts. And to this point,
4 other than detailing the circumstances of this prior
5 representation has not asserted that he has a conflict of
6 interest in this matter.

7 Mr. Francomano, one last time, on the record, do you
8 assert that there is a conflict that precludes you from
9 representing Mr. McCants during this trial?

10 MR. FRANCOMANO: I do not, Your Honor.

11 THE COURT: Okay. The Court has nonetheless reacted
12 to the whole scenario as laid out before it last week, by
13 taking the very conservative and careful step of appointing
14 conflict counsel for Mr. McCants. And in doing so, went out
15 of its way to appoint one of the most experienced and highly
16 regarded criminal defense attorneys in this state to counsel
17 Mr. McCants in this regard. And then to advocate Mr. McCants'
18 position before the Court this morning.

19 And Mr. Himeles has not disappointed. He has risen
20 to that task, as I had hoped he would, and I believe has made
21 the strongest and most persuasive arguments that the fact
22 wills allow in this situation. And despite the efforts of a
23 very good lawyer, who has taken the time to get himself up to
24 speed on the relevant facts and circumstances, the case I
25 find, at least so far, cannot be made that there is a

1 disqualifying conflict for Mr. Francomano.

2 The reality is that, given how the testimony is
3 going to evidently be presented, there doesn't appear to be a
4 line of cross-examination of any substance for counsel for Mr.
5 McCants to pursue vis-a-vis Mr. Valcourt. Even if there was,
6 there's no indication or evidence that, especially given the
7 passage of time, the different character of the case that Mr.
8 Francomano was involved in with Mr. Valcourt, there doesn't
9 seem to be anything arising out of that that would amount to
10 impeachment material or the like that would assist Mr. McCants
11 in the situation that he finds himself here. But I don't want
12 to spend too much time on that topic, because the most
13 important point is that there doesn't -- it's not apparent to
14 the Court that there is a line of cross-examination that it
15 would be logical to pursue regardless, simply because Mr.
16 Valcourt has nothing to say about Mr. McCants.

17 So we're left with Mr. Himeles's best argument,
18 which is a very theoretical one. And it pulls us into sort of
19 well, Mr. McCants has *Pinkerton* liability, potentially, given
20 the way that this is charged. And that's, you know,
21 theoretically true. But if it doesn't change how a lawyer,
22 sitting where Mr. Francomano is, if it doesn't change how he
23 would approach the witness Valcourt and examine him, then it's
24 really a legal circumstance of no particular significance. It
25 doesn't change what Mr. Francomano would or could do in the

1 circumstances. He just doesn't have anything to ask Mr.
2 Valcourt as the situation presents itself right now.

3 And in the present situation, Mr. Himeles is unable
4 to convince me that there is some line to go down. What Mr.
5 Himeles has got is the -- not fanciful notion that things
6 change during the course of a trial. And you can't predict
7 with perfect certainty, during the week before trial,
8 everything that's going to happen during a nine week long
9 trial. Well, that's fact, but it's a potential, a remote one.
10 But the ultimate conclusion is there is no ripe conflict at
11 this time. And, therefore, there's really nothing for Mr.
12 McCants to waive.

13 I agree, ultimately, with Mr. Wrobel's view about
14 Mr. Valcourt, there's really nothing for him to waive either
15 because there's no real conflict. And the last part of this
16 is that Mr. Francomano knows what his responsibilities are as
17 an officer of this Court. And if, during the course of the
18 trial, the circumstances change such that he changes his
19 position with the Court and finds that he does have a
20 conflict, then I have every confidence that he will alert the
21 Court to that circumstance.

22 I've given Mr. McCants the opportunity to express
23 his view on this subject, through Mr. Himeles, in terms of
24 laying out how there may well be a conflict. Certainly, the
25 client's side of the equation has to be looked at very

1 closely. It's not dispositive that Mr. Francomano says
2 there's not a conflict. That's why we appoint conflict
3 counsel, we want to hear from the client through counsel,
4 separate counsel, specifically on that question. But I'm not
5 persuaded that there is a problem here. And, accordingly,
6 nothing changes for now.

7 Mr. Himeles, I will be grateful if you will agree to
8 treat your appointment as one that continues through the life
9 of the trial. And be grateful if you are on sort of a loose
10 standby basis to be brought back into the discussion if
11 circumstances should change. Are you willing to do that?

12 MR. HIMELES: I am, Your Honor. But my -- I should
13 tell the Court and counsel that I will be out of town on
14 business the entire week of November 27th, except I'll be
15 leaving that Monday afternoon.

16 THE COURT: Okay. When do you think Mr. Valcourt
17 might testify, Mr. Martinez?

18 MR. MARTINEZ: Not until December at the earliest,
19 Your Honor.

20 THE COURT: Okay. So it sounds like we'll be okay
21 there.

22 And, Mr. Wrobel, I suppose I should make the same
23 request of you. Although, it's a little harder for me to even
24 imagine how your services might be further needed with respect
25 to this question. But you've entered into an attorney-client

1 relationship with Mr. Valcourt, so if you could be available
2 as well on a standby basis if we have to revisit this. Are
3 you willing to do that?

4 MR. WROBEL: Certainly, Your Honor.

5 THE COURT: Okay. Anything else we can productively
6 address today, Mr. Martinez?

7 MR. MARTINEZ: No, sir. Thank you.

8 THE COURT: Mr. Himeles?

9 MR. HIMELES: No nothing. Thank you, Your Honor.

10 THE COURT: Mr. Francomano, anything?

11 MR. FRANCOMANO: No, Your Honor.

12 THE COURT: Anything else from you, Mr. Wrobel?

13 MR. WROBEL: No, Your Honor.

14 THE COURT: Okay. Very good. Thank you to
15 everyone. We're in recess. The defendant's remanded to the
16 custody of the Marshal. Counsel are excused.

17 (The proceedings were concluded.)

18 I, Christine Asif, RPR, FCRR, do hereby certify that
19 the foregoing is a correct transcript from the stenographic
20 record of proceedings in the above-entitled matter.

21 /s/
Christine T. Asif
22 Official Court Reporter
23
24
25

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